IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 80 of 2007
In
CIVIL APPLICATION No. 195 of 2007
In
STAMP NUMBER No. 1310 of 2007
With
Civil Application No. 234 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHIVAM INDUSRIES THRO. PARTNERRAJESH NARIYALWALA - Appellant(s)
Versus
O.L. OF BINIL CHEMICALS & 6 - Opponent(s)

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Appearance :
MR PAVAN S GODIAWALA for Appellant(s) : 1,
MS AMEE YAJNIK for Opponent(s) : 1,
MR NAGESH SOOD for Opponent(s) : 2,
None for Opponent(s) : 3 - 5, 7,
MR MIHIR JOSHI with M/s. SINGHI & CO for Opponent(s) : 6,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 28/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 20.06.2007 of the learned Company Judge rejecting the OJ Civil Application No. 195 of 2007, which was filed by the appellant herein, for seeking condonation of delay of about 340 days in filing the application for recalling of the order dated 19.04.2006 of the learned Company Judge confirming the sale of the land in question in favour of respondent No.6 herein at the price of Rs.25,11,000/-. The appellant had submitted in the application that he was ready and willing to pay a sum of Rs.37 lacs for the said land, and that the valuation of the property was more than Rs.36 lacs and as such, the land could not have been sold for a sum of Rs.25,11,000/-.

2.0. The facts leading to filing of this appeal are as follows:-

2.1. M/s. Binil Chemicals Ltd. was ordered to be wound up by the order dated 07.11.2003 of the learned Company Judge. Thereafter, the Sale Committee was appointed by the Court. The Committee comprised of the Official Liquidator and the representatives of all the secured creditors i.e. State Bank of India,

Dena Bank, GIIC and GSFC. At the meeting of the Sale Committee held on 01.07.2005, the valuation report was opened in presence of Sale Committee members and the Committee decided to sell the assets in the following manner :-

Lot No.	Particulars	Reserve Price
I.	Land	Rs.25.00 Lacs
II.	All assets other than land, compound wall, T.K. Office and record	Rs.1.00 Crore
III.	Composite offer for Lot No.I and II	Rs.1 Crore 25 Lacs

The Sale Committee decided to release an advertisement in two leading newspapers – (1) Gujarat Samachar, Ahmedabad Edition and Baroda Edition, and (2) Economic Times, Ahmedabad Edition.

2.2. After the advertisement was issued, ten parties collected the tender forms and nine parties submitted their offers. All the offers were opened in presence of the Sale Committee members and the highest offers received were as under :-

Lot No.	No. of offers received	Highest offer
I	2	25.11 Lacs
II	7	81.00 Lacs
III	1	75.00 Lacs

(Shri Ambica Trading had applied for Lot No. I and II)

Thereafter, the inter-se bidding took place amongst the bidders and the highest offers received were as under :-

Lot No.	Particulars	Price	Received from
I	Land	Rs.25,11,000/-	Asian Paints
II	All assets other than land, compound wall, T.K. Office and record	Rs.1,00,11,111/-	Rao Metals Pvt. Ltd.

2.3. At the said meeting, while the highest offer for the land in question was made by respondent No.6 herein (Asian Paints) at Rs.25,11,000/-, other bidders were not willing to revise their offers upwards. The representative of GIIC stated that the offer should match the valuation report i.e. approximately Rs.36 lacs, whereupon the representative of Asian Paints stated that he wanted to ascertain exact dues of GIIC and other statutory and local dues (because the purchaser was liable to pay the said dues of the Company in liquidation). Thereafter, Asian Paints submitted their

letter dated 27.09.2005 to the Official Liquidator confirming the offer of Rs.25,11,000/- as unconditional offer for purchase of the land in question.

2.4. The Official Liquidator accordingly submitted OL Report No. 111 of 2005 in December 2005 seeking directions of the Company Court for accepting the offer of M/s. Rao Metals Pvt. Ltd. for Lot No.II for a price of Rs.1,00,11,111/- and the offer of Asian Paints for Lot No.I for Rs.25,11,000/- and for confirmation of sale in favour of the respective parties. On 28.12.2005, the Company Court issued notice on the said OLR. The notices were issued to all the secured creditors i.e. State Bank of India, Dena Bank, GSFC and GIIC and also to the intending purchasers who were the highest bidders. The matter was ordered to be placed for hearing only after the opponents were served. There is no dispute about the fact that all the opponents in the said OLR including four secured creditors were served. There is also no dispute about the fact that no counter affidavit or objections were filed by any of the secured creditors. Ultimately, when the matter came up for hearing before the Company Court on 19.04.2006, the Official Liquidator submitted that he had received a Fax on 01.02.2006 from one Mr. B.L. Joshi

stating that the party was offering a sum of Rs.30 lacs for the land of the Company in liquidation. The Official Liquidator further stated that the Fax contained a reference of Demand Draft of Rs.3 lacs as EMD, but till the date of hearing i.e. till 19.04.2006, no such draft was received. In view of the fact that the author of the Fax did not take any part in the proceedings in response to the advertisement, nor did he send any Demand Draft towards Earnest Money Deposit, the Company Court did not consider the so called offer made through Fax from Mr. B.L. Joshi. In absence of any opposition, the Company Court confirmed the sale of the land in question in favour of Asian Paints (respondent No.6 herein) for a sum of Rs.25,11,000/- and the sale of Lot No.II in favour of M/s. Rao Metals Pvt. Ltd. for a sum of Rs.1,00,11,111/-. The Company Court also made it clear that no nominations were to be allowed.

2.5. Pursuant to the above order, M/s. Rao Metals Pvt. Ltd. was put into possession of the land after deposit of the requisite amount and was granted nine months' time for removing the plant and machinery, demolishing the construction, structures and removing the debris. After the said party cleared the super structure and the plant and machinery and after the Asian Paints

had already paid the entire sale price by 05.05.2006 the Asian Paints Ltd. was put into possession of the land on 26.05.2007 as per the Official Liquidator's letter dated 19.05.2007.

2.6. The appellant herein in the meantime made application dated 01.05.2007 for recalling the order dated 19.04.2006 on the ground that the property was valued at Rs.36 lacs, but was sold for only Rs.25,11,000/-. The appellant, therefore, offered to pay Rs.37 lacs. Since the order sought to be recalled was passed as far back as on 19.04.2006, the appellant also submitted Civil Application No.195 of 2007 for condonation of delay of 340 days.

2.7. Asian Paints – respondent No.6 herein whose highest offer of Rs.25,11,000/- was accepted by order dated 19.04.2006 filed counter affidavit opposing the application and pointing out that since the purchaser was liable to pay the dues of the Electricity Company and also the dues of GIDC, after the order dated 19.04.2006, respondent No.6 had entered into negotiation with the Electricity Company and the dues of Rs.11 lacs were settled with the Electricity Company for Rs.6,00,000/- and the amount was already paid to the Electricity Company. Respondent No.6 further

pointed out that according to the GIDC, their dues from the Company in liquidation were in the region of about Rs.85,46,000/- and that with addition of interest, the dues were likely to go beyond Rs.1 crore. The application was also opposed on the ground that the appellant had not participated in the auction held pursuant to the public advertisement in July 2005 and that the highest offer of respondent No.6 was already accepted by the Company Court as far back as on 19.04.2006. It was also submitted that the appellant herein had filed an application making his offer after almost twenty one months from the date of advertisement inviting offers. It was also contended that the appellant did not offer any explanation for the gross delay and latches.

2.8. It appears that none of the secured creditors, though served, supported the appellant – applicant for recalling the order dated 19.04.2006. The learned Company Judge after hearing the counsel for all the parties recorded the finding that the appellant had not given any explanation for the delay of 340 days, except stating that he came to know about the order dated 19.04.2006 from M/s. Rao Metals Pvt. Ltd. a few days before filing of the application. The learned Company Judge also recorded that when

the counsel for the appellant was specifically asked as to why the appellant did not submit his tender in response to the public advertisement, the only answer given was that the appellant did not know about the public notice. The learned Company Judge, however, recorded that the offer of respondent No.6 was made on 11.08.2005 and if after twenty one months, somebody comes and makes a better offer, then such offer cannot be accepted simply on the ground that the better offer is being made for the value of the property in question. Hence, while rejecting the application for condonation of delay it was observed that even on merits the learned Judge did not find any reason to recall the order dated 19.04.2006.

2.9. It is against the above order that the appellant is in appeal before us.

3. We have heard Mr. Godiawala, learned advocate for the appellant – applicant, Ms. Amee Yajnik, learned advocate for the Official Liquidator, Mr. Mihir Joshi for M/s. Singhi & Co., learned counsel for respondent No.6 – Asian Paints Ltd. and Mr. Nagesh Sood, learned advocate appears for State Bank of India on an

advance copy served upon the State Bank of India.

4. Mr. Godiawala has submitted that when the appellant was making a higher offer which would match the value of the property as indicated in the valuation report i.e. Rs.36 lacs and odd amount, the Company Court ought to have reviewed the order dated 19.04.2006, more particularly, when that order was for confirmation of sale in favour of respondent No.6 for a sum of only Rs.25,11,000/-. It is submitted that the Company Court erred in proceeding on the basis that the Sale Committee being alive to the market condition and that the valuer's report is always inflated.

Strong reliance is placed on the decision of the Apex Court in *Union Bank of India vs. Official Liquidator, High Court of Calcutta, 101 Company Cases 317* and *Divya Manufacturing Co. (P) Ltd. vs. Union of India, AIR 2000 Supreme Court 2346* and unreported judgment of another Division Bench of this Court in *Valji Khimji & Company vs. OL of Hindustan Nitroproduct (Gujarat) Ltd. in OJ Appeal No.69 of 2004 decided on 25.08.2005* in support of the

contention that before execution of the sale deed the Company Court can recall the previous order for confirmation of sale and accept the higher offer subsequently made.

5. On the other hand, Mr. Mihir Joshi instructed by M/s. Singhi and Co. Ltd., learned counsel for Asian Paints has opposed the application and submitted that the appellant, never having made any offer in response to the public advertisement nor even before the Company Court nor having given any explanation for the delay of 340 days in filing the application for recalling the order, cannot be permitted to pray for recalling that order after lapse of more than one year. It is submitted that with passage of time, the price of land is bound to go up and if the offer of the appellant is taken into consideration at this stage, there will be no finality to Court sale. It is also submitted that the valuation report merely indicated valuation of the assets of the Company without taking into account any liabilities of the Company. The Electricity Company was demanding Rs.11 lacs from the Company in liquidation and the GIDC was demanding more than Rs.85 lacs as its dues from the Company in liquidation plus interest thereon, which would take the figure well beyond Rs.1 crore. It was

respondent No.6 which took the business risk of purchasing the property with such onerous liabilities over and above paying the full consideration by 05.05.2006. Respondent No.6 also invested its time and energy in negotiating with the authorities like Electricity Company and GIDC for arriving at the settlement for reducing the liabilities. Respondent No.6 has already paid Rs.6 lacs to the Electricity Company and is in the process of finalizing the settlement with the GIDC also. If at this stage the appellant is permitted to intervene merely because it is prepared to offer Rs.37 lacs without having made any offer in the last twenty one months, apart from the appellant getting undue advantage and also getting advantage of reduced liabilities towards Electricity Company and GIDC, respondent No.6 would be seriously prejudiced as it would never be able to purchase a similar parcel of land in the same area at Rs.25 lacs or even at Rs.37 lacs. However, having gone far too ahead in the transaction, without prejudice to its rights and contentions, respondent No.6 Company is ready to pay an additional amount of Rs.12 lacs with interest thereon from 19.04.2006 in order to see that without entering into any controversy, the full price as per the valuation report made at the relevant time is received by the secured creditors.

Mr. Joshi has also submitted that respondent No.6 is purchasing the land not as a middle man, but for developing the infrastructure for its own industry being run in the area for the last three decades, whereas, the appellant himself claims to be a trader in chemicals and real estate.

It is also submitted that no other secured creditor has ever challenged the order dated 19.04.2006 of the Company Court in favour of respondent No.6.

Mr. Joshi also relied on the decision of the *Apex Court in State of Rajasthan vs. Nav Bharat Construction Co., (2005) 11 Supreme Court Cases 197* in support of the contention that a vague application for condonation of delay deserves to be rejected. Reliance is also placed on the decision of the learned Single Judge of this Court in *Akshar Corporation vs. OL of M/s. Vivekanand Mills Ltd. in Misc. Civil Application No.12 of 2004 dated 29.09.2004* in support of the contention that some higher offer for confirmation of sale cannot be

a ground for condoning the delay.

6. Mr. Nagesh Sood, learned advocate for the State Bank of India has submitted that the Bank would like to support the appellant in requesting for reauctioning of the land in question so that the secured creditors get higher amount than Rs.25,11,000/-.

7. Ms. Amee Yajnik, learned counsel for the Official Liquidator has submitted that there was no irregularity or fraud in the entire process of issuing the public advertisement and in conducting the sale or auction of the land in question. It is further submitted that the Official Liquidator would, however, abide by the orders of the Court.

8. Having heard the learned counsel for the parties, after recording the statement made by Mr. Mihir Joshi for M/s. Singhi and Co. learned advocate for respondent No.6 – Asian Paints Ltd. that respondent No.6 will pay the further amount of Rs.12 lacs with interest thereon at the rate of 12% per annum from 05.05.2006 till the date of payment by Demand Draft in favour of the Official Liquidator within three weeks from today, we are not inclined to

admit this appeal as we find that the appellant has not given any explanation for the gross delay of 340 days in filing the application for recalling the order dated 19.04.2006 and also because the property is being sold to respondent No.6 for the value of the property as indicated in the valuation report at the relevant time against which valuation the secured creditors had never raised any objection, respondent No.6 has also accepted the heavy liabilities of the Company in liquidation to the Electricity Company and GIDC and that the property is being purchased by respondent No.6 for developing the infrastructure for its own industry being run in the area for the last three decades, as against the appellant who is merely a trader in chemicals and real estate.

9. The OJ Appeal is accordingly dismissed. The Civil Application for stay accordingly does not survive and is disposed of.

[M.S.SHAH, J.]

[K.A.PUJ, J.]

mrpandya*